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A Pure Theory of Law by Hans Kelsen

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"Court's current position on Blackstone's prior restraint dictum" as being "well expressed" in Chief Justice Warren's dissent in *Times Film*.²⁷

Finally, it must be pointed out that the author's more or less indiscriminate excerpting from majority, concurring, and dissenting opinions is confusing, misleading and does not present anything approaching an accurate portrayal of the law. An obvious example of this is found at page 226 where, under a paragraph headed *Any Film Censorship is Called Unconstitutional*, this proposition is supported solely by the Black-Douglas concurring opinion in *Superior Films v. Ohio*.²⁸

The basic defect of the book is that the author does not "tell it like it is," but rather as he would like it to be. It is doubtful that lawyers or law students would find the book to be of any value.

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A PURE THEORY OF LAW. By Hans Kelsen. Berkeley: University of California Press, 1967. Pp. 356. \$7.50.

In normal expression the term law tends to carry a deceptively familiar meaning; the term jurisprudence a somewhat forbidding connotation of exploration of the philosophical deep. By most standard measures, the contrast holds. Yet not only does the juridical underlie the legal order, but riddles its every aspect. A profound simplicity irradiates from the child's reaction of "why" to a command, a simple query ever relevant to all aspects of the legal imperative. Consequently law as a field requires refinement, not so much to glean the dross of reality as to allow intelligible perception of its supple internal system of validification. This immensely difficult task, itself an exercise in the highest orders of jurisprudence, Dr. Hans Kelsen endeavors to undertake in *A Pure Theory of Law*.¹

His work does not pretend to be some metaphysical thunder out of Sinai, nor any interpretive social scientific prism refracting the legal order as reactive adjustments to cultural context, nor indeed any kind of revealed gospel dispensed from profound preconceptions of prin-

²⁷ *Id.* at 42.

²⁸ 346 U.S. 587 (1954).

¹ H. Kelsen, *A PURE THEORY OF LAW* (1967).

ciple. He seeks range, not omniscience. Endeavoring to stress law as a science, Kelsen works with Teutonic thoroughness and meticulously close, if not confusingly subtle, reasoning to give the normative values of law a cohesive and coherent architectonic structuralization. If only because of his concentration of effort, let alone because it is the lifetime reflections of one of the western world's leading jurists, this work contributes substantially to both the physiology and the anatomy of jurisprudence.

Kelsen perceives both a theory and a condition. In his view, failure to realize the need for theory crucially debases the science of law per se, for "uncritically . . . law has been mixed with the element of psychology, sociology, ethics, and political theory."² Theory aside though, the condition tempers the core. Human norms can at best constitute relative values, but both law and the state nevertheless find their key phyla of distinction in the concept of coercive obligation. This cognates them, and without it they would, after the Marxian manner, wither away. Flux and social justice notwithstanding, the law therefore assumes a functional infallibility, in effect, the process commissioned to stop the buck of Truman era renown.

Upon these assumptions, Dr. Kelsen weaves with interstitial perception the resultant relationship of the law into its paramount colleague fields of reference. He does not exhaust every possible subject, but avoids no major relevancies.

With regard to nature, the author conducts a careful series of differentiations. The law must be cast in terms of norms, an "ought" that is nevertheless directed toward an "is" of reality which must possess minimum effectiveness to be at all valid. Hence the law must be centered about human realities, constantly keeping in mind the two different spheres of value and reality, and relying on validity rather than truth for measurement. To be sure man may incline to perceive matters anthropocentrically, replete with transcendental and socially immanent sanctions, but these like the facts of operative existence remain essentially contextual, since universally all objects of law turn out in the final analysis to be "orders of human behavior." Vortexed around the functioning community as both a berth of reality and a source of legitimation, the legal order requires a monopoly of coercion under its paramount charge of achieving a collective security essential to social peace. But while this peace may be an essential function it is not the *summum bonum*, for Kelsen deeply stresses that communal pacification is not the "moral minimum" common to all law. Its mission embraces more, and reaches for more.

² *Id.* at 1.

The reaching, though, shuns pretention. In relation to morals the *Pure Theory of Law* (and this review hereinafter follows the author's capitalization) rejects traditional notions of jurisprudence and posits one criterion—beware of absolutes. Law and morals constitute different universes of a normative system, a living dichotomy demanding perpetual differentiation. Moreover moral values and indeed moral systems the *Pure Theory* denominates as relative, thus obviating some kind of ubiquitous, intrinsic ethic against which law must always be assessed. In this interpretation justice as well as values becomes relativistic, and hence renders the immemorial issue of an unjust law essentially immaterial. The thesis is methodological, the result substantive, for

... the task of the science of law is not to approve or disapprove its subject, but to know and describe it . . . not the evaluation of its subject but its value-free description.³

Law must also be clearly demarcated from natural science. The latter moves largely on the principle of causality, the former together with social science upon the idea of imputation. Analagous to cause, this connective concept stands apart through involvement with human cognition. The apposition finds reinforcement in primitive human thought patterns, which essentially personalized the outer world and could not begin to comprehend the dualism of nature and society. Still, the role of this cognition assumes no sovereignty. The *Pure Theory* rejects the "mingling of law and the science of law" characteristic of the realistic school of jurisprudence, and will not transvaluate. The social scientist is not a social authority, legal theory only describes while legal norms prescribe, and as a whole the law may command but it cannot teach.

Concordantly, Dr. Kelsen vigorously objects to any idea of the law as ideology, with its concomitant theoretical implication of theory as legal sociology. The *Pure Theory* seeks to define and clarify, to validate rather than evaluate. Here then the approach receives its philosophical classification and hence its name, that of radically realistic legal positivism. Political type assessments are repudiated, in that

[p]recisely this anti-ideological tendency shows the Pure Theory of Law is a true science of law. Ideology . . . veils reality either by glorifying it with the intent to conserve and defend it, or by misrepresenting it with the intent to attack, to destroy, and to replace it by another. . . . Such ideology is rooted in Wishing, not Knowing. . . .⁴

³ *Id.* at 68.

⁴ *Id.* at 106.

In a way such an attribution of impartial *maestoso* reaches to the heart of the concept of the rule of law, an attribution to which some contemporary American juristic trends might do well to harken.

The corpus of the *Pure Theory*, replete with intermeshing into the whole panoply of regular problems and concerns of the legal order, emerges in its bifurcated treatment of the static and dynamic aspects of the law. The first deals with the law as a system of valid norms—the law at rest—while the second deals with the process by which the law is created and applied—the law in motion. Legality encompasses the whole, for the law is unique in that it regulates its own creation and movement, a transcription of the ancient yet adept adage of the law as a seamless web.

In legal statics, the analysis proceeds with well marshalled albeit somewhat convoluted vigor. The element of delict acts as a constant condition of the law, but again must always be considered relatively—transgressions are always *mala prohibita*, never *mala in se*. Sanctions form the essence, and legal meaning can only be expressed in terms of human behavior. As an outgrowth obligation controls, and human rights must mainly be understood as reflexive correlative applications of duty. Rights are not to be derogated, but neither are they to be given a natural law type of premium priority that would permanently compromise the legal order. Political rights stand in a special category, in that they allow an influence in the formation of the will of the state, but only one principle stands immutable, the “lawfulness of the application of the law, immanent in all law.”

More particularly, this casts a different complexion on the legal spectrum of the concept “person.” Authority should not be personified as some kind of fictional self, although deference should be rendered to the office and not the man designated to its exercise. The content of legal norms is not individuals, but their behavior, a theorem allowing for recognition of superordinate and subordination yet withal erasing traditional distinctions between private and public legal relations. So also juristic persons—whether human, corporations, or even a controlling community—are not separate but sectile entities, blended by the ether engraftments of legal science into one system distinguished by their scope rather than any subjective particularism. By this approach in Kelsen’s analysis, the *Pure Theory* qualifies as universal, totalistic, and objectively valid, a “truly organic” theory treating law as an order and all legal problems as order problems.

If validity then becomes so vital, so also must the issue arise of what makes law valid, and the answer involves the dynamic aspect of

law. This means process, the presupposition of a last and highest legitimizing norm. This approach eschews norm content, and certainly the axiom of a "directly evident" postulate emanating from reason and imparting a substantive, deductible hierarchy of interrelated value judgments. Instead it looks to the functional reason for validity, the determination of a norm-creating authority stressing the "how" of norm creation. By stressing impartial functionalism, the *Pure Theory* thus disengages from obtrusions that unduly alloy, legal analysis, and prevents construction of a valid and viable legal science.

So process, or if you will in the larger sense procedure, reigns. A presupposed ultimate norm wherefrom others flow controls the gradation as a kind of prototype first cause, but still with content fundamentally excluded. Imparting the logical unity to the multiplicity of norms necessary to constitute the legal order, the basic norm stipulates effectiveness as the key condition of validity. Crucially, though, the differing levels must be distinguished, and the relationship may range from partially choate to semi-inchoate, thus allowing international law for all its grievous deficiencies to subsist as a cognitive legal order. Again in the dynamic aspect the detachment of neutrality vis-a-vis internal law applies, in that the basic norm does not perform an "ethical-political but only an epistemological function." Law, for all its potency and power, can only be considered legally.

Consonantly, the *Pure Theory* approach moves to close the traditional diarchies of theory, especially those concerning the state. Contrasts between private and public law are "relativized" by positivism, thereby making them an intra-systematic rather than an extra-systematic differentiation and thereby also dissolving the "absolutizing" ideological heterodoxy implying that public law is somehow foreign to private legality and placing legal power of the state in a class by itself. Even more strenuously this concept of whole pattern nullifies the diarchy of law and state, for the state should be considered as the most total of legal orders and the idea of a "community generated by law must become the only possible justification of the state." To assert otherwise does not endeavor to reach the essence of the state, but rather to insidiously strengthen state authority. State power has "normative character," and instead of concealing some peculiar mystique of force only embodies the penetrating and forming pinnacle of the overall effectiveness of the national legal order. This approach allows maintenance of the doctrine that the state can do no wrong, at least in the necessity of ultimate type obligative decisions, but does not reject—indeed rather encourages—compensatory concrete actions to re-

dress errors of state as well as accessibility of rejoinder against action beyond color of authority.

In a word, power should have the aura of respect, never the corona of sanctity. Final authority must prevail, but not in a realm of its own. In more traditional theoretical terms the state has the self-obligation "while it exists as a social reality independent of law" that "creates the law" to subject itself to the law, "voluntarily as it were."⁵ By the linkage of man-created norms composing the law and formulated in its process there opens the way for a true science of law, a science inclusive of the international sphere.

Dr. Kelsen, whose work in this area reflects the deserved eminence of decades, projects the *Pure Theory* to a logically consistent but debatable proposition—that international law qualifies as a viable legal order integrated with the whole texture of legal systems. Admittedly a primitive legal order in a state of "far-reaching decentralization," the international system possesses its sanctions—reprisal and war—and indirectly its coercive mandate through massive although filtered applications to human behavior through its traditional practice of having only states as its subjects. This reasoning allows legal cognizance of the absolute, collective liability of citizens and the individual culpability of officials for illicit acts of state, an approach harmonious with the *Pure Theory's* insulation of law from morals yet shying away from the searing dilemmas these very issues place on the twentieth century soul. It may well be that legal systems need pasteurized neutrality, but legal refinement in the interests of any legal objective cannot legitimately purify the law to the point of being oblivious to principle.

This refinement, however, does permit a tapestry of theoretical unification of the international and national legal orders. Again dualism is untenable, for the two do not depend upon two alien though kindred norms and no conflict exists. The two are monistically joined, whether primacy belongs to the national or to the international order, for a state either incorporates the international into its internal order by reception or the international itself assumes a sovereignty validating a multitude of partial legal orders within a "universal world legal order." Theoretically the conclusion abides, the "cognitive unity of all valid law," even though the world community remains far more of a dream than an aspiration and some orders like Red China behave in a

⁵ *Id.* at 312.

fashion that even the *Pure Theory* would be hard put to call anything but outlawry.

This book must be credited with a valiant effort at condensation, for it endeavors to present a singular, coherent formulation within a comparatively limited space. In so doing the work squarely meets and treats most of the basic subjects known to civilized law, and does so with logical competency and reasonable consistency to explain these subjects in terms of the overall theoretical framework. So consistently, as a matter of fact, that the great care taken with construction often tends to bog down into undue repetition. The work cannot be seriously criticized, however, on any major score except perhaps one. Whenever the *Pure Theory* approaches the area of the active, especially the political, the analysis veers away. To be sure it forswears these considerations, calling their disposition impossible of decision on the basis of its version of legal science inasmuch as they are solely dependent on "nonscientific, political considerations." Internally this may be perfectly defensible, but the query abides. As a matter of both principle and practicality, can law ever validly reject such matters completely? In a word, can values ever be truly denatured from determinative human behavior?

Be that as it may, background considerations do not injure the presentation, as can be the case so often and so easily with works of this type and this ambition. Max Knight's skillful translation comes through with arresting clarity for a work in German philosophical thought, that is if Teutonic abstraction can ever achieve such a status in English. The Roman law context of reference is rather constant, but handled fairly and rather deftly by the author, whose illustrative cases in point are rather suprisingly simple by comparison with the theoretical construct, and whose contrasting references to the Anglo-American system fully demonstrate his long and deep experience with both jurisprudential systems. The technique and the insight are fully in keeping with the tremendous scope and depth, and in most respects the excellence, of the effort.

This work in no way can be called light reading, even for those seasoned in legal subjects. The treatment is contracted almost to the point of total compression, endeavoring as it does to present an entire system of legal philosophy within, for a law book especially, one slender volume. Thus Kelsen's *Pure Theory* will probably best serve as a reference work, or as a source of juridical stimulation, far better than it can serve any explanatory or instructional role. And while perhaps no mother lode, if legally such a thing can even be conceived, it holds

rich lore of original, creative thought in both substance and method. This plenary undertaking qualifies as whole thought, an uncommon approach that in itself, in this creatively churning age that tends to look somewhat askance at integration, goes far toward assuring its permanent significance.

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